

*National Labor Relations Board*  
**OFFICE OF THE GENERAL COUNSEL**  
**Advice Memorandum**

**DATE:** May 5, 1998

**TO:** Victoria E. Aguayo, Regional Director, Region 21

**FROM:** Barry J. Kearney, Associate General Counsel, Division of Advice

**SUBJECT:** National Steel and Shipbuilding Company, Case 21-CA-32229

385-2525-4300, 385-2525-5000, 530-4090-6000, 530-8018-3000, 530-8018-6900

This case was submitted for advice as to whether National Steel & Shipbuilding Company ("the Employer"), has failed and refused to bargain with the Cabinet Makers, Millmen and Industrial Carpenters Local 721, United Brotherhood of Carpenters & Joiners of America, AFL-CIO ("Local 721") in violation of Section 8(a)(5) of the Act. The essence of the issue raised is whether the Employer's refusal to bargain was privileged due to a lack of due process involving a merger of Local 721 and a sister local, Local 1300 of the United Brotherhood of Carpenters ("UBC") in March, 1997, and an alleged lack of substantial continuity between Local 721 and Local 1300, which had formerly represented employees of the Employer.

FACTS

Prior to September 30, 1992, Local 1300 represented employees of the Employer and three other maritime employers in Southern California. <sup>(1)</sup> About one half, or approximately 200, of Local 1300's members were employed by the Employer, and one half by the other three employers. The Employer's last collective bargaining agreement with Local 1300 was effective from 1988 to September 30, 1992. In October 1992, shortly after this collective bargaining agreement expired, Local 1300, along with other local unions in various trades which represented shipyard employees of the Employer, went on strike. The unions returned from the strike without reaching a contract settlement, executing a return to work agreement instead. The Region has little information about the nature of the return to work agreement. In February 1993, following the unions' rejection of the Employer's last, best and final offer, the Employer implemented the terms of that offer, which did not contain a union security clause. <sup>(2)</sup>

After the strike ended, all but a handful of the Local 1300 members working for the Employer ceased to pay dues to

Local 1300. <sup>(3)</sup> The loss of half its dues revenues caused Local 1300 to go bankrupt. <sup>(4)</sup>

In or about March 1997 <sup>(5)</sup> the UBC General President directed the merger of Local 1300 into Local 721, with the merged locals designated as Local 721. This action was apparently taken pursuant to the UBC Constitution, which provides, at Section 6(A), that "The United Brotherhood is empowered, upon agreement of the Local Unions and Councils directly affected, or in the discretion of the General President subject to appeal to the General Executive Board, where the General President finds that it is in the best interests of the United Brotherhood and its members, locally or at large. . . to merge or to consolidate local Unions or Councils. . . ."

On or about May 1, the Employer received a letter from Frank Gurule, the Business Manager and Financial Secretary for Local 721. The letter stated that the General President of the UBC had merged Local 1300 and Local 721; that Local 721 consequently had all the bargaining rights of Local 1300; and that the merger would not alter the Employer's labor-management relations. The letter also stated that Local 1300's Chula Vista, California, office was closed and that all matters involving representation were to be referred to Local 721's satellite office in San Diego, California. The Employer was advised to direct all contractual matters involving Local 1300 to Local 721 business representatives Mike Kolender and Mario Rael. <sup>(6)</sup>

On or about May 29, Carl W. Hinrichsen, the Manager of Industrial Relations for the Employer, sent Gurule a letter which

stated that the Employer was precluded by law from recognizing or dealing with any other labor organization unless and until it is satisfied that the union represents an uncoerced majority of employees in an appropriate bargaining unit, and so declined to recognize Local 721. The letter stated further that the Employer would not refuse to recognize Local 721 upon proof of majority support. On June 4, 1997, Hinrichsen sent Gurule a second letter which posed thirty questions concerning the merger, the nature of a merger vote, and similarities and differences between the two locals.

On July 30, attorney Joyce M. Lee, representing Local 721, responded to Hinrichsen's June 4 letter. Lee informed Hinrichsen that no vote on the merger of the locals had been conducted among the Employer's employees, and, therefore, that Local 721 would not provide the bulk of the information Hinrichsen had requested concerning a merger vote. Lee stated that UBC General President Douglas McCarron had directed the merger of the locals, and asserted that no structural changes resulted from the merger. To this point, Lee stated that Local 1300 business agent Rael had been retained in the same capacity by Local 721, and that the By-Laws, Constitution, organizational structure, membership benefits and dues were in essence the same for the two locals. On August 14, Lee sent a second letter to Hinrichsen, requesting that he contact her by August 21, to inform her whether the Employer would extend the recognition, previously given to Local 1300, to Local 721. Lee advised that should she receive no response to the request for recognition by August 21, Local 721 would file an unfair labor practice charge.

By letter dated August 21, attorney William Wright, representing the Employer, informed Lee that until the Employer was satisfied that Local 721 was the representative of a majority of its employees in the unit, it was precluded by law from recognizing the local. On August 26, 1997, Lee filed the instant charge.

### ACTION

We conclude that the charge should be dismissed, absent withdrawal. The Employer was privileged to refuse to recognize and bargain with Local 721 because (1) there were inadequate due process safeguards in the merger of Local 1300 into Local 721; and (2) there was not adequate continuity of representation between Local 1300 and Local 721.

With regard to the issue of whether Local 721 succeeded to the bargaining rights of Local 1300, we note that in *Seattle-First*,<sup>(7)</sup> the Supreme Court held that an employer is obligated to bargain with a union whose members have voted to affiliate with another union so long as: (1) the affiliation<sup>(8)</sup> was accomplished with an adequate opportunity to vote with "due process" safeguards; and (2) there was substantial continuity of representative identity between the "old" organization and the "new" one.<sup>(9)</sup> The Court rejected the Board's argument that employees in the bargaining unit who were not union members had the right to vote in a decision concerning merger. However, the Court reaffirmed the other criteria the Board had been using to assess mergers, as follows:

#### A. Procedural Due Process

To determine whether procedural due process, the first criterion, is satisfied, the procedures involved in the affiliation or merger must be examined. Considerations include whether the members had an opportunity to vote on the matter in an orderly fashion in an atmosphere free from restraint and coercion,<sup>(10)</sup> whether employees had adequate notice of the election and an opportunity to discuss the matter,<sup>(11)</sup> and whether there was any member objection to the vote.<sup>(12)</sup> The key factor is whether "the members had a proper opportunity to express their desires." *Minn-Dak Farmers Cooperative*, 311 NLRB 942, 945 (1993), *enfd.* 32 F.3d 390 (8th Cir. 1994).

The facts of the instant case establish that no due process was afforded any members of Local 1300 with respect to the merger decision. There is no evidence that employees were given any notice of the proposed merger; no meeting were held to discuss the proposed merger; no vote of any kind was taken to determine whether the employees did indeed desire the proposed merger. Thus, the merger, accomplished solely by the UBC General President's fiat, did not meet any of the Board's due process requirements.<sup>(13)</sup>

We recognize that there are cases in which the Board has approved of changes in a union's relationship to an international even though members never directly voted on those changes. Those cases are not apposite here because in those cases the union's existence or structure was unchanged. Thus, in *City Wide Insulation*, 307 NLRB 1 (1992), the president of the Carpenters

Union merged two District Councils, pursuant to his power under Section 6A of the union's constitution. The local union remained unchanged, and because the District Council was deemed merely "an administrative adjunct" to the local union, *id.* at 4, no due process concerns were raised by the absence of a members' vote on the merger of the District Councils.

In other cases, even though union members had not voted directly on the affiliation of small independent unions with larger international unions, there were no due process concerns because members of the unions had authorized their representatives to vote on the proposed mergers. <sup>(14)</sup>

*Carpenters Local 1052 (Los Angeles County District Council of Carpenters)*, 944 F.2d 610 (9th Cir. 1991), on which the Union relies, is not controlling. The Circuit Court, deciding the case under the LMRDA, rejected the claims of three dissident locals who brought an action in district court to enjoin the UBC from consolidating sixteen of the seventeen construction local unions in the Southern California area into four new locals. None of the locals were allowed to vote on the merger. The consolidation caused the local constructions unions to lose the right to elect business representatives, who under the merger plan were to be appointed by the District Council. The unions also lost the right to retain all supplemental dues payments, ninety percent of which had previously been kept by the locals, but would be sent directly to the District Council after the merger. The Ninth Circuit noted that the UBC Constitution did not guarantee local unions the right to elect business representatives or to vote on the merger of locals, and that the UBC bylaws expressly empowered the District Council, by delegate vote, to alter its revenue stream, including the amount of supplemental dues it receives from the local unions. The Circuit Court thus found that "the UBC's interpretation of its own constitution is reasonable and entitled to substantial deference." *Id.* at 614.

In failing to consider Board law or the Act, the court did not address the due process and substantial continuity requirements the Board imposes on mergers such as that in the instant case. The court's main concerns regarded LMRDA issues, specifically, the relationships between union members and their union. The court did not have to reach the question of whether, under the NLRA, an employer was obligated to recognize and bargain with the post-merger union.

## B. SUBSTANTIAL CONTINUITY OF REPRESENTATION

The general test for substantial continuity of representation, the second criterion in merger and affiliation cases, is whether the affiliation or merger produced a change that is "sufficiently dramatic to alter the union's identity. . . ." <sup>(15)</sup> In each case, continuity is determined by a factual comparison between the "old" and "new" unions. To determine whether a merger or affiliation has altered the essential nature of a bargaining representative as it affects the employees, the Board examines several factors, including whether the successor union's structure, its officials, and its powers and duties vis-a-vis those employees ensures them a substantial continuation of the prior representation. <sup>(16)</sup> No one factor is crucial. <sup>(17)</sup> Smaller proportionate overall representation in the merged local for members of the old local is not determinative as to whether the basic identity of the representative remains the same. <sup>(18)</sup>

In *Western Commercial Transport, Inc.*, 288 NLRB 214 (1988), the Board found the absence of the requisite continuity where a small, independent entity with membership limited to the employees of a single employer affiliated with a district lodge representing a large number of employees of various employers, spread over a large geographic area. The district lodge was the surviving representative after the merger. Notwithstanding compelling evidence of the desire of the members of the independent union for the merger, the Board concluded that the old union lost virtually all of the autonomy that it had enjoyed, and therefore did not continue. The Board found that there would be substantial changes in the size, organizational structure and administration that would be reflected in the union's relationship with its members and the represented unit. The Board based its finding on the determinations that (1) the prior officers were not going to retain their positions or continue to play any role in union affairs after the affiliation, and (2) their duties relating to day-to-day contract negotiation and administration would be assumed by a full-time district lodge business agent who was elected by the district lodge as a whole and who had had no prior connection or working experience with either the employer involved or the unit employees. The Board reached that determination even though the employees had the right to vote on contract ratification and to elect a chief steward to work with the district lodge business agent on the initial steps of grievances, and two employee representatives to work with the business agent on contract negotiating committees.

On the other hand, in Sullivan Bros. Printing, Minn-Dak Farmers Cooperative, Service America,<sup>(19)</sup> and Central Washington Hospital, the Board found sufficient continuity of representation because, inter alia, members formerly represented by one union had a voice in the new union through their numbers, the role of their former officers as officers in the new union, or the rights of their bargaining unit.<sup>(20)</sup>

Here, the facts pertaining to a continuity determination adduced by the investigation are as follows: The nomination and duties of officers and the rules governing application for membership for both sister locals are governed by the Constitution and By-laws of the UBC. The sole officer of Local 1300 prior to the merger, business agent Mario Rael, appears not to have been an employee of the local, but rather of the International Union, which paid his salary. Rael was not retained in any official capacity by Local 721 after the merger, and appears to have left the employ of Local 721 shortly after the merger. Thus, no former Local 1300 officers are involved in Local 721.<sup>(21)</sup> No evidence was presented to indicate whether or not any membership rights and duties of Local 1300 members changed when they became members of Local 721. Local 721's by-laws do not set forth an amount or amounts for monthly dues; Local 721 asserts that the Local 721 dues were similar to the \$22.50 per month dues set forth in Local 1300's by-laws. No information was provided on whether Local 1300 ever voted on contracts, if at all; Local 721 asserts that its members invariably vote on whether or not to accept contracts. It is not clear whether or not Local 1300's negotiations and grievance procedures were similarly handled by both locals. Local 721 maintains that the merger of the locals resulted in no change in the pension, health, welfare, vacation or education funds (provided for in Local 1300's last contract). Local 721 asserts that after the merger, Local 1300's San Diego facility was closed and its books were transferred to Local 721's office in Whittier, but also states that there were very few such records at the office of the bankrupt local.

Thus, it is clear that there are some specific differences between Local 1300 and Local 721, and there is insufficient information about Local 721's practices in other key areas to say that it is merely a continuation of Local 1300.

In light of the above, we conclude that there was not the requisite continuity of representation between Local 1300 and Local 721 necessary to impose an obligation on the Employer to recognize and bargain with Local 721 as the successor to the bargaining rights of Local 1300. Although there is some limited similarity between the structure and practices of two sister locals of the UBC, it cannot be said that from the viewpoint of members, Local 721 is a continuation of Local 1300. Local 721's claim to represent the former members of Local 1300 is insufficient because it is based merely upon the UBC president's unilateral decision to merge a bankrupt local union with a solvent, more active local union.

Under these circumstances, the Employer is entitled to treat Local 721 as a stranger union until it has demonstrated its majority status in a Board election.<sup>(22)</sup> Accordingly, by refusing to recognize Local 721, the Employer did not violate Section 8(a)(1) and (5), and the charge should be dismissed, absent withdrawal.

B.J.K.

<sup>1</sup> These other employers, who are subcontractors to the Employer, located within the Employer's facility, are Hopeman Brothers, PCI, Inc. and Campbell Shipyard.

<sup>2</sup> One of the unions, IBEW Local 569, filed a charge against the Employer on behalf of itself and the other unions, including Local 1300, on November 21, 1994, alleging that the Employer bargained in bad faith by presenting and insisting upon regressive union-security proposals on and after May 19, 1994 (Case 31-CA-21861). Local 1300 filed a charge against the Employer on November 20, 1995, alleging that the Employer bargained to impasse on a permissive subject, yard security, since on or about August 1, 1995 (Case 31-CA-21866). A consolidated complaint issued, and a hearing was held in May, 1996. The Administrative Law Judge issued a decision on December 2, 1996, dismissing the complaint in its entirety, and the Board affirmed the ALJ's decision on November 7, 1997, 324 NLRB 1.

<sup>3</sup> At some point after the strike, Local 1300 business agent J. V. "Chuey" Hernandez was replaced with business agent Mario Rael, who was the sole officer of Local 1300. According to Local 721, Rael's salary was not paid by Local 1300, but by the UBC, as Local 1300 was "essentially" bankrupt. Local 721 contends that Rael negotiated and administered collective bargaining agreements and resolved grievances during the period between the strike and the merger, but has not offered any evidence showing that Rael actually engaged in such activities. After the merger, Rael ceased to serve as a business agent. Local 721 asserts that Rael spent several months following the merger aiding employers and employees with the transition from Local 1300 to Local 721, but again has not offered any evidence regarding exactly what Rael did in this capacity and for how long he did so. Local 721 asserts that Rael introduced Local 721 personnel to the three employers who agreed to recognize Local 721, and was available to answer questions for the first few months after the merger. After this alleged "transition period," Rael became an organizer and was not retained as an officer of Local 721. Rael himself refused to cooperate with the Region's investigation or to provide Local 721 with a declaration regarding his activities. At the present time, Rael holds no position with Local 721; it is not known when he left employment with the local.

<sup>4</sup> The Region was unable to ascertain the date of Local 1300's bankruptcy, save that it occurred sometime between the end of the strike in 1993 and the merger of Local 1300 and Local 721 in March 1997. The Region believes that Local 1300 continued to represent the employees of the other three marine employers up until the merger, that these employees continued to work for their employers pursuant to the same terms and conditions of employment as before the strike, and that they continued to pay dues to Local 1300 until the merger.

<sup>5</sup> All subsequent events occurred in 1997.

<sup>6</sup> It appears that Local 721 similarly informed the other three marine employers of Local 1300 members of the merger of the Locals. These three employers agreed to recognize Local 721 after the merger.

<sup>7</sup> *NLRB v. Financial Institution Employees, Local 1182* (Seattle-First National Bank), 471 U.S. 1098, 121 LRRM 2741 (1986).

<sup>8</sup> Although Seattle-First dealt with an affiliation of one union with another, the Board applies the same standards to mergers as to affiliations. *F.W. Woolworth Co.*, 268 NLRB 805, (1984), vacated on other grounds, 122 LRRM 2368 (D.C. Cir. 1986), on remand 285 NLRB 854 (1987); accord: *Hammond Publishers, Inc.*, 286 NLRB 49, 52-53 (1987) (AC petition). As the Board has repeatedly indicated, cases involving amendments of certification also turn upon analysis of the same factors as do cases involving alleged unfair labor practices. See, e.g., *State Farm Mutual Automobile Insurance Co.*, 225 NLRB 966, 967 (1976); *Newspapers, Inc.*, 210 NLRB 8,9 n. 4 (1974).

<sup>9</sup> *May Department Stores Co.*, 289 NLRB 661, 664-666 (1988), enfd. 897 F.2d 214 (7th Cir. 1990). cert. den. 111 S. Ct. 245 (1990). See generally GC Guideline Memorandum 86-8, "Guideline Memorandum Concerning Continuity of Bargaining Representative after Affiliations, Mergers and Similar Cases," August 14, 1986.

<sup>10</sup> *Bear Archery*, 223 NLRB 1169, 1170-1171 (1976), enf. denied 587 F.2d 812 (6th Cir. 1977).

<sup>11</sup> *State Bank of India*, 262 NLRB 1108 (1982).

<sup>12</sup> *Insulfab Plastics, Inc.*, 274 NLRB 817, 823 (1985), enfd. 789 F.2d 961 (1st Cir. 1986); *Aurelia Osborn Fox Memorial Hospital*, 247 NLRB 356, 359 (1980); *Bear Archery*, 223 NLRB at 1172; *Kentucky Power Co.*, 213 NLRB 730 (1974).

<sup>13</sup> Compare *Sullivan Bros. Printers*, 317 NLRB 561, 563-64 (1995) (members' discussions were evidence that vote met due process requirements). See also *Syscon International, Inc.*, 322 NLRB 539, 544 (1996) (merger valid because union members voted; employer's employees did not vote because they had ceased paying dues and were no longer union members).

<sup>14</sup> See, e.g., *Aurelia Osborn Fox Memorial Hospital*, supra; *Knapp-Sherrill Co.*, 263 NLRB 396 (1982); *The House of the Good Samaritan*, 248 NLRB 539, 543 (1980).

<sup>15</sup> *May Department Store Co.*, supra, 289 NLRB at 665.

<sup>16</sup> *Hydrotherm, Inc.*, 280 NLRB 1425, 1428 (1986), enfd. 125 LRRM 3431 (4th Cir. 1987), and authorities cited therein.

<sup>17</sup> *Central Washington Hospital*, 303 NLRB 404 (1991).

<sup>18</sup> See *Kentucky Power*, 213 NLRB at 731; *Montgomery Ward & Co.*, 188 NLRB 551, 552 (1971).

<sup>19</sup> 307 NLRB 57 (1992).

<sup>20</sup> See also *RTP Co.*, 323 NLRB No. 4, slip op. at 8 (1997) ("...only limited and anticipated changes in the structure of the certified representative flowed from this affiliation....," distinguishing *Western Commercial Transport*, supra).

<sup>21</sup> Compare *RTP Co.*, supra, slip op. at 8 (same officers responsible for negotiations, contract administration and grievance processing before and after affiliation); *Toyota of Berkley*, 306 NLRB 893 (1992)(same).

Compare *Quemetco, Inc.*, 226 NLRB 1398, 1399 (1976) (continuity found even though old officers were replaced where no employees complained about absence of old officers who "simply wanted to get out of the union business . . .").

<sup>22</sup> *Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301, 87 LRRM 3236 (1974).